

EXHIBIT QQQ

In The Matter Of:

*KYLA HANNAH HERSHEY-WILSON v.
NEW YORK CITY*

April 20, 2006

*CONFERENCE
SOUTHERN DISTRICT REPORTERS
500 PEARL STREET
NEW YORK, NY 10007
212-805-0300*

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April 20, 2006

Page 1

Page

[1] 64kPherM
[2] UNITED STATES DISTRICT COURT
[3] SOUTHERN DISTRICT OF NEW YORK
[4] -----X
[5] KYLA HANNAH HERSHEY-WILSON,
[6] Plaintiff,
[7] v. 05 Cv. 7026 (KMK)
[8] NEW YORK CITY, et. al.,
[9] Defendants.
[10] -----X
[11] New York, N.Y.
[12] April 20, 2006
[13] 11:30 a.m.
[14] Before:
[15] HON. KENNETH M. KARAS,
[16] District Judge
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[1] claims of misconduct and other, arguably, privileged
[2] information. And I ended up agreeing with you that Judge
[3] Francis's rulings were not clearly erroneous or contrary to
[4] law. I was just struck by that.
[5] The city gets a five-point demerit for citing an
[6] unpublished Second Circuit decision
[7] **MR. MIRRO:** The Supreme Court ruled --
[8] **THE COURT:** -- the Judicial Conference said that as of
[9] 2007, it is okay to cite unpublished opinions. But just be
[10] careful because there are some people in the building who might
[11] get pretty hot under the collar.
[12] **MR. MIRRO:** We will, your Honor.
[13] **THE COURT:** Quick question for Mr. Dougherty. I will
[14] definitely hear from you, Mr. Meyerson.
[15] What is the standard of review where, what Judge
[16] Francis did was said that my ruling in MacNamara precluded him
[17] from, in effect, agreeing with Mr. Meyerson?
[18] So what we have is a situation, before the case gets
[19] referred to a Magistrate Judge for discovery purposes, I issue
[20] a discovery ruling in another case, albeit, one that's related,
[21] which is why I got a hundred of these things. And Judge
[22] Francis feels bound by that ruling in this case. And then Mr.
[23] Meyerson appeals that ruling.
[24] Is it Rule 72, abuse of discretion and contrary to
[25] law?

Page 2

Page 4

[1] (In open court)
[2] MR. MEYERSON: Good morning, your Honor, James
[3] Meyerson for Ms. Hershey-Wilson.
[4] THE COURT: Good morning, Mr. Meyerson.
[5] MR. DOUGHERTY: Good morning, Jeff Dougherty for
[6] defendants.
[7] THE COURT: You got the call on this one, Mr.
[8] Dougherty.
[9] MR. MIRRO: And James Mirro.
[10] THE COURT: Good morning, your Honor. Again, for the
[11] record. This is becoming a habit. There are worse habits in
[12] life.
[13] I have to say, Mr. Meyerson, I was struck your
[14] reply --
[15] MR. MEYERSON: -- I don't know if that's good or bad.
[16] THE COURT: It's sort of interesting. There is this
[17] sort of righteous speech-like tone to you. You sort of have to
[18] live by the privilege and die by the privilege.
[19] And you are very critical of the city's invocation of
[20] certain privileges relating to their office -- psych testing
[21] records are sought by the plaintiff. And misconduct.
[22] Invariably the city's attorneys object to what I was saying
[23] before; that's true.
[24] You were here six, seven weeks ago when they wanted to
[25] invoke certain privileges having to do with unsubstantiated

[1] **MR. DOUGHERTY:** Your Honor, I would submit that in our
[2] papers to Judge Francis, while I can't determine what it is
[3] that, you know, ultimately determined his rationale, that we
[4] did submit case law as well as transcripts from your ruling in
[5] MacNamara. And I believe this is a Rule 72 motion to be
[6] governed by the earlier clearly erroneous standard or contrary
[7] to law standard, whether or not at this level a discovery
[8] motion can be overturned.
[9] **THE COURT:** His memo endorsement says that he felt --
[10] and I had it out a second ago, let me pull it out -- Judge
[11] Kara's prior ruling on this issue precludes the arguments now
[12] raised by plaintiff's counsel.
[13] So it is sort of a, what he said in another case,
[14] which Judge Francis almost seems to be saying was law of the
[15] case for all of these cases.
[16] So why is that something that should be deferred to
[17] when, in effect, he is citing my ruling in another case?
[18] It is like saying I should refer to my own ruling in a
[19] different case.
[20] **MR. DOUGHERTY:** I would say it is just as proper for
[21] any Magistrate Judge to reply on a Southern District judge in a
[22] related action or a nonconsolidated.
[23] **THE COURT:** But not necessarily to have preclusive
[24] effect, right?
[25] **MR. DOUGHERTY:** Yes.

April 20, 2006

Page 5

[1] **THE COURT:** Do you think that the MacNamara ruling has
[2] a preclusive effect in this case?

[3] **MR. DOUGHERTY:** I think that ruling was likely here
[4] considered by Magistrate Francis and was part of what is
[5] probably a conglomerate of facts that, of law, that he used to
[6] make the decision in the MacNamara case.

[7] **THE COURT:** Thank you.

[8] Mr. Meyerson.

[9] **MR. MEYERSON:** Your Honor, I do apologize for any
[10] righteousness that --

[11] **THE COURT:** -- don't apologize for righteousness.

[12] **MR. MEYERSON:** Actually, I believe it came out, I
[13] think there was a, I am saying righteous indignation on my
[14] part. My client, Ms. Hershey-Wilson is 21 years old, and I
[15] kept thinking of my 21-year-old daughter who happens to be an
[16] activist.

[17] **THE COURT:** I believe that was worth saying. I was
[18] only tweaking you.

[19] You are right, what goes around comes around.

[20] To the extent that the defendant takes what you think
[21] is a cavalier attitude toward your client's privilege, my only
[22] point is, at least Judge Francis and I agreed with you to their
[23] privilege.

[24] **MR. MEYERSON:** I understand.

[25] This is a very narrow issue, your Honor. Although I

Page 7

[1] **MR. MEYERSON:** No. And I got him reversed.

[2] **THE COURT:** He is a great jurist. Go ahead.

[3] **MR. MEYERSON:** And that's not due to me. That was
[4] because I was lucky that day in front of the circuit.

[5] But the point I want to make here is, you have taken a
[6] very broad view in MacNamara of what emotional damage claims
[7] mean in reality and in law.

[8] My client, let me give you these facts, and I just,
[9] you have seen them, but my client is 24 years old. At 24 she
[10] is arrested at the RNC.

[11] When she was in high school, she and her family went
[12] to family counseling. She may have gone to independent
[13] counselling. The therapist said, you are depressed, here is
[14] some medication.

[15] She graduates from high school, has no medication or
[16] therapy for four years, gets arrested at the RNC and,
[17] basically, says, I have a natural emotional reaction when I am
[18] in jail for 24 hours. That is my emotional reaction. Has
[19] nothing to do with my mental health condition. I was scared, I
[20] was sad, I was anxious. And I got out 25 hours later. I took
[21] in the fresh air, I sighed. And it largely evaporated, all
[22] though not totally. I went to Dr. Ores before I went back to
[23] Maine. You can have my records from Dr. Orres. I am okay. I
[24] am not seeking to put into this record, in that litigation, my
[25] mental health condition. I am not going to call a

Page 6

[1] think it has profound practical and profound legal
[2] implications.

[3] The narrow issue is what triggers the waiver of a
[4] client's mental health record privilege that pre -- the records
[5] coming from a prelitigation-incident therapy.

[6] You, in MacNamara, I think that's a question of law.
[7] And I think that Magistrate Judge Francis, on both a legal and
[8] practical and differential basis, said to himself, look,
[9] whatever I think of Meyerson's arguments, and however I might
[10] have ruled, I am not going to write an opinion because whatever
[11] I think, Judge Karas has sent all of these cases to me and I am
[12] not going to buck Judge Karas because he made a ruling in a
[13] previous case which has indicated his position of law on this
[14] matter. And, therefore, I am precluded from overruling Judge
[15] Karas. He can overrule me, I can't overrule him. Fair enough.

[16] I then file this appeal and say to you, your Honor,
[17] that with due respect, I am critical, and I accept this with
[18] whatever admonition you want to give me, I am critical of your
[19] MacNamara decision.

[20] And it is like I recently said to the Second Circuit
[21] about Judge Koeltl, that I realize that the Second Circuit
[22] recognized his wisdom as a jurist, as I do your wisdom as a
[23] jurist. You are just wrong, I think, on what you did in
[24] MacNamara.

[25] **THE COURT:** No offense to Judge Koeltl.

Page 8

[1] psychiatrist, I am not going to say I have a permanent
[2] condition, a clinical or nonclinical condition.

[3] **THE COURT:** Paragraph 71, quote, the plaintiff
[4] denies -- of the incident herein described --

[5] **MR. MEYERSON:** -- I accept that as my failure in
[6] developing the case. We say that's not the case. In point of
[7] fact, the facts are the facts. She never has sought treatment.

[8] **THE COURT:** The fact that she hasn't sought treatment,
[9] that wouldn't be a cause to bounce that claim.

[10] **MR. MEYERSON:** I am standing up here and saying to you
[11] that my client will get on the witness stand at the trial and
[12] say, when I say, what emotional injury did you suffer -- well,
[13] let me withdraw that.

[14] Assuming my client just got on the witness stand and
[15] said, I was in jail for 25 hours, and I didn't ask her another
[16] question about any emotional reaction injury, and then I said
[17] to a jury, she was in custody 25 hours, you should award her a
[18] sum of money for the loss of her liberty, either for 25 hours
[19] taken, anxiety and sadness she felt, objection, your Honor,
[20] there is no evidence in the record.

[21] Okay, so I want to ask her, what was your emotional
[22] reaction injury?

[23] And she will say, I was sad, I was unhappy, I was
[24] scared.

[25] And when did that end?

April 20, 200

Page 9

Page 1

[1] It ended largely when I got out of jail. But I went
[2] to somebody who said the records will show probably you will be
[3] all right. Just go home.

[4] **THE COURT:** Let me just stop you right there.

[5] Even if she is claiming residual emotional injuries,
[6] such that she went to, after the fact, see a therapist of some
[7] kind, and even at the end of the day if, as a result of seeing
[8] the therapist things get better in her life, again we are not
[9] here at trial deciding what they get to put in. The question
[10] is whether or not anything about her psychological history, her
[11] mental health history -- she was 65 and had high school visits
[12] to a therapist, is that different?

[13] That's why you have to be careful with my ruling in
[14] MacNamara. Once that door is even cracked open a little bit,
[15] how can it be that the defendants don't get to have access to
[16] her psychological history to rebut either the claim for the
[17] injuries at all or the extent of the damages she should get as
[18] a result of the alleged injury?

[19] **MR. MEYERSON:** If --

[20] **THE COURT:** By the way, that's the majority view of
[21] the courts in this district.

[22] **MR. MEYERSON:** Actually not the majority view of
[23] courts throughout the country, it is the view of courts
[24] throughout this district, which comes out of Judge Buchwald's
[25] decision when she was a magistrate. Rather, it is a more

[1] psychiatrist to look at her, the law in this district, if they
[2] would argue that, is, you can't do that because this is really
[3] a garden-variety thing.

[4] And if that's the case, what is the value of the
[5] records except to fish into the most highly sensitive material
[6] that -- my client doesn't even know what's in there, that no
[7] magistrate should look at. That I don't want to look at.

[8] And my position is, therefore, that if she couldn't be
[9] subjected to an examination by a psychiatrist to disprove
[10] something that we are not even attempting to prove, then there
[11] is no basis for the records.

[12] And if you want to make a thing out of, did she have
[13] psychiatric treatment five years ago in high school?

[14] She has admitted that.

[15] She has also admitted that she had medication for
[16] depression and family counseling.

[17] I don't know what the litigation value would be of
[18] bringing that out in front of a jury, because a jury would be
[19] offended by that.

[20] But if the city wanted to do that, and you let --

[21] **THE COURT:** -- that's a different question. We are at
[22] discovery.

[23] **MR. MEYERSON:** That's correct. So what is the value
[24] of the records? We must again get to the point, Judge, of
[25] these records are ordinarily privileged.

Page 10

Page 12

[1] complex claim in which the views of psychiatrists figured
[2] prominently in prelitigation events.

[3] That is that there was a connection obviously made in
[4] Sidor between the prelitigation therapy that that client had,
[5] leading Magistrate Buchwald to conclude that there -- that
[6] access to those records were relevant. There has to be some
[7] degree of time and material relevance.

[8] And your prior ruling simply --

[9] **THE COURT:** -- forget the prior ruling. Let's talk
[10] about this case.

[11] **MR. MEYERSON:** But the problem is, Magistrate Judge
[12] Francis seems to have implied that whatever the merits of your
[13] arguments, Meyerson, that I might agree with, I can't touch it
[14] because I am reading Judge Karas's ruling --

[15] **THE COURT:** -- argue it as if the standard review was
[16] de novo.

[17] **MR. MEYERSON:** Okay. Here is my response to you.

[18] At the same time the law in this district, as you
[19] interpret it, seems to suggest that access to those records are
[20] permissible because she, by merely saying I had emotional
[21] reaction for the time of the event, triggers the waiver.

[22] The law in this district also seems to suggest, by
[23] Judge Carter and Judge Sotomayor, when she was a District
[24] Judge, is that when the city then says, and I will get to the
[25] logic of it, we want to take her examination, we want a

[1] What triggers the waiver of the privilege, that is the
[2] narrowest -- that's the very narrow issue of law. And if you
[3] say that what triggers it is simply the fact that a client that
[4] is put into jail for 25 hours and would testify, forget what I
[5] put in my complaint, if you can, for the moment, would simply
[6] testify, look, when I was in jail I was upset.

[7] **THE COURT:** And give me money for that, right?

[8] **MR. MEYERSON:** Well --

[9] **THE COURT:** -- and give me money.

[10] **MR. MEYERSON:** That is correct.

[11] **THE COURT:** And how is it that the defendants are to
[12] prepare their defense, to rebut any claim you might make as to
[13] why she should get any money or why she should get a certain
[14] amount --

[15] **MR. MEYERSON:** -- Judge, it seems to me that you are
[16] seemingly bootstrapping yourself into almost -- almost into a
[17] nonsensical position.

[18] **THE COURT:** I am surprised to hear you say that.
[19] Because every case I have read, and I have read a bunch, in
[20] addition to the ones you cited me to, to the extent that courts
[21] have said that the privilege is waived even into the so-called
[22] garden variety claims, not a term of art as far as I can tell,
[23] but that's the one that everyone seems to be using, but the
[24] reason it is relevant, so that the defendants can attack the
[25] causation between the offending event and the so-called mental

April 20, 2006

Page 13

Page 15

[1] distress. And also the claim for damages.

[2] I am not making this up.

[3] **MR. MEYERSON:** I understand that. And then I say to
[4] you, what do you expect to find in mental health records of a
[5] high school kid?

[6] Perhaps the high school kid might have said, gee, you
[7] know, I am depressed. And in five years if I get arrested,
[8] what will happen to me, doc? Will I be -- what conceivable
[9] relevance beyond the fact, if it is relevant at all, that she
[10] has had therapy, had medication, and that ceased to exist four
[11] years ago? If that's relevant, fine.

[12] **THE COURT:** Because when somebody claims to have
[13] suffered some sort of emotional damage, distress, anxiety,
[14] depression, their prior history, that might relate to this --
[15] we are going in circles.

[16] **MR. MEYERSON:** Can I give you another example?

[17] **THE COURT:** Let me give you another example.
[18] Let's take it out of mental health, put it in physical
[19] health.

[20] Somebody goes to a hospital and they decide to
[21] involuntarily commit the person. And in the middle of him
[22] struggling he yells out, ouch, my knee. And he doesn't put in
[23] any expert testimony that he actually ripped his meniscus,
[24] medial meniscus, or anything like that. He says, I want money
[25] for pain and suffering because my leg got hurt that day. And

[1] It is not limited to that.

[2] **MR. MEYERSON:** But --

[3] **THE COURT:** -- what you are trying to do --

[4] **MR. MEYERSON:** -- I am now limiting it.

[5] **THE COURT:** Mr. Meyerson, there is a complaint that
[6] you filed. You have brought actions against defendants. And
[7] you are seeking damages for emotional distress and anxiety.
[8] And you are trying to, at the same time, asking potentially for
[9] damages on those emotional harms. You are trying to put a wall
[10] on someone's emotional slash mental history and what they
[11] suffered on that day.

[12] **MR. MEYERSON:** I am not --

[13] **THE COURT:** -- Mr. Meyerson, interrupting is not
[14] helpful to anybody. I never put time limits on you. Don't do
[15] that.

[16] **MR. MEYERSON:** I'm sorry.

[17] **THE COURT:** But that strikes me as antithetical to
[18] common sense. And many courts around the country have said,
[19] you cannot pretend that a person's mental past has nothing to
[20] do, is completely irrelevant, and all the standards that we
[21] use -- and there is no conceivable relevance to the emotional
[22] slash mental harm that somebody suffered on that day.

[23] And you cannot ask the defendants to defend themselves
[24] on causation and on the extent of the damages without getting
[25] access to that information.

Page 14

Page 16

[1] it turns out that 20 years prior to that he saw an orthopedic
[2] surgeon.

[3] **MR. MEYERSON:** For a knee injury?

[4] **THE COURT:** Yes.

[5] **MR. MEYERSON:** He is entitled probably -- they are
[6] probably entitled to get those records.

[7] Here is where we are having our debate. And it is a
[8] fascinating debate, I tried to make it in my submission.

[9] You are equating an emotional reaction to being in
[10] jail for 24 hours, which is attended to the loss of the liberty
[11] itself. It's almost intrinsic in it.

[12] I mean, I did have a client, a Quaker, an older man
[13] who, when he was asked at a deposition by the City of New York
[14] what his reaction was to being in jail for 24 hours, as the
[15] good Quaker he was, he said, actually, it was an enlightening
[16] experience. And he actually wrote to the Quaker paper.

[17] Again, it brings up a lot with my daughter, she went
[18] to a Quaker school.

[19] But he wrote to the Quaker paper. And I said to
[20] myself, you just indicated you didn't have any damages for
[21] being in there.

[22] The point being, most people, in being confined for 24
[23] hours involuntarily in a not-pleasant situation, might say, I
[24] was sad, I was upset, I was scared. And then I say --

[25] **THE COURT:** -- that's not how the complaint is worded.

[1] Now, that is not to say that there cannot be limits.

[2] That is not to say that every record gets turned over. That is
[3] not to say that there are temporal decisions here.

[4] You have a 24-year-old client, not a 74-year-old
[5] client. So her high school records -- I wouldn't say, if I was
[6] Judge Pitman, to a five-year limitation. But the reason for
[7] the limitation is that it recognizes that within that time
[8] period it is not -- say there is no reasonable relevance of the
[9] records -- go ahead.

[10] **MR. MEYERSON:** There are two things you mentioned in
[11] there. One is the complaint and one is the moreover arching
[12] philosophical debate we are having --

[13] **THE COURT:** -- I don't do philosophy, Mr. Meyerson. I
[14] am doing law.

[15] **MR. MEYERSON:** Philosophical legal debate that we are
[16] having, which is not inconsequential.

[17] The first thing about the complaint is to the extent
[18] that I drafted a complaint that defined, that says what it
[19] says.

[20] Of course, an attorney and a party can come in and
[21] say, I withdraw the lawsuit, I withdraw this claim. I narrow
[22] this to the extent of a claim.

[23] And to the extent that I have failed my client in the
[24] manner of the drafting of the complaint, in the amended
[25] complaint, to make it an -- that there is this all encompassing

[1] emotional trauma that flows from this event, I stand indicted.
[2] But I withdraw that. And my client has narrowed the claim.
[3] And the claim is simply that while I was incarcerated, and for
[4] a day or two thereafter, I had the ordinary natural reaction.
[5] Which I assume --

[6] **THE COURT:** -- she says is ordinary and natural. But
[7] how is it that a jury is to evaluate what she says is ordinary
[8] unless they know something potentially about her emotional
[9] past?

[10] You know, New York law recognizes the thin skull
[11] doctrine for psychological harms not recognized by the Second
[12] Circuit. But there are plenty of cases within New York State
[13] that recognize it.

[14] It is interesting because that could easily inure to
[15] the plaintiff in these kinds of cases.

[16] I don't want to get into philosophy.

[17] **MR. MEYERSON:** This is a legal argument, your Honor.

[18] What I import from your comment, that I listened to
[19] very carefully, and I apologize for interrupting, although I
[20] did hear what you are saying, is, how do you know what is, and
[21] I understand what you are saying, inquiring, how do I know that
[22] that's natural?

[23] The natural flow of that inquiry leads to them getting
[24] records, because, you will say, get these records; and them
[25] saying, oh, but irrespective of the records, she shouldn't have

[1] **THE COURT:** Because she is only six years removed from
[2] high school. If she were 74 years old and it was high school
[3] records, you might have a point. Which is why many courts have
[4] accepted, in part, your argument.

[5] But they tailor it to the facts before them. And
[6] that's what I am trying to do, and say, that whether or not
[7] MacNamara was the right decision or not, I am focused on this
[8] case.

[9] **MR. MEYERSON:** Okay. Well, I would ask you, then, to
[10] defer back to Magistrate Judge Francis, and let me make the
[11] arguments to Magistrate Judge Francis on the assumption, as I
[12] read his decision, that he did not even waive the arguments,
[13] simply said, I am precluded.

[14] And it is understandable why he did that.

[15] My last point and I will sit down, and it is, by
[16] comparison, not a knee injury, but more directly in point.

[17] In an antiwar demonstration case that I have with the
[18] city, a client was in custody seven or eight hours. She was an
[19] NYU student. A freshman then.

[20] She'd had counseling when she went to NYU. She said
[21] that during the seven or eight hours she was on and off crying,
[22] the next day she was upset. And that's the extent of her
[23] emotional injury associated with what she believed was a false
[24] arrest and loss of her liberty.

[25] The city didn't ask for the mental health records in

[1] had this reaction. Or maybe because of the fact that she
[2] concedes she had depression, that's why she had the reaction.
[3] Your Honor, we need to have her go to our psychiatrist for
[4] several hours.

[5] And Mr. Meyerson now needs to put on a psychiatrist so
[6] that the jury can be -- so it can be explained to a jury that
[7] intrinsic in being restrained of your liberty for 24 hours in a
[8] jail, is a natural reaction of, whatever it might be, might
[9] even be giddiness, but in this case it was sadness.

[10] I just think, your Honor -- by the way, I believe the
[11] law in this district is that they wouldn't be able to get that
[12] mental health --

[13] **THE COURT:** -- why are we having a discussion about
[14] something that is not on the table right now? Because the
[15] cases do recognize the distinction between a defendant's
[16] interest in getting past mental health history of a plaintiff,
[17] either an employment discrimination case, a civil rights case,
[18] and a rule --

[19] **MR. MEYERSON:** -- at least --

[20] **THE COURT:** -- according to the cases that I read,
[21] let's --

[22] **MR. MEYERSON:** -- but I think they are inner related,
[23] because if, in fact, you can't get the examination, what does
[24] the value of a record that says she was depressed in high
[25] school have to do with her saying, I was afraid --

[1] that case. That's neither here nor there, that's that
[2] litigation. But the import of your decision is, that if my
[3] client had come in and said, look, I had no emotional damages
[4] other than the fact that when I was in custody I cried on and
[5] off, the next day I related to my family what happened, and I
[6] was upset. And that was it. That they then -- that triggers a
[7] waiver to open everything and anything.

[8] And if you are fortunate to be a young kid, an
[9] 18-year-old freshman at NYU, or a 24-year old -- if you are
[10] unfortunate enough, maybe, to be 24 and had gone to a shrink
[11] when your family sent you to a shrink, when you were in high
[12] school, the unfortunate situation, under Judge Karas's ruling,
[13] is that if you were 74 you wouldn't have to give up those
[14] records, but at 24 you do. It doesn't make any sense. And
[15] maybe the law --

[16] **THE COURT:** What you are saying is it is never
[17] relevant. What I am saying, it depends on the case.

[18] Do you think the blanket rule is never relevant and
[19] they take the --

[20] **MR. MEYERSON:** -- there are Courts that have taken
[21] that position. Your Honor, please, with due respect, I respect
[22] your broad ruling, it is a very broad ruling, but --

[23] **THE COURT:** I haven't ruled yet.

[24] **MR. MEYERSON:** Well, in MacNamara, there it's a broad
[25] ruling.

April 20, 2006

Page 21

[1] **THE COURT:** It is not a broad ruling. It's actually
[2] not a broad ruling. But doesn't matter, we are not here to
[3] reopen MacNamara.

[4] **MR. MEYERSON:** There are cases that reject your
[5] position, that say --

[6] **THE COURT::** -- it wouldn't be the first time. Or the
[7] last.

[8] **MR. MEYERSON:** That say that the emotional reaction
[9] condition that I am describing here doesn't put in to play her
[10] mental health condition, which is a different thing, as a
[11] matter of law, that is what I am arguing.

[12] **THE COURT:** Okay. Thank you, Mr. Meyerson.

[13] **MR. DOUGHERTY:** Well, your Honor, what, at first what
[14] I think we need to do is pull back and realize that we are in a
[15] court of law. And subsequently we are governed by rules of
[16] procedure.

[17] And here the rule that we are governed by is the
[18] standard under Rule 72.

[19] And under that standard, and under the case law
[20] governing that standard, Mr. Meyerson has failed to show that
[21] Judge Francis's ruling was either clearly erroneous or contrary
[22] to law.

[23] And just briefly on the clearly erroneous point.
[24] Under *Lindenal versus Citco Refining*, the reviewing Court has
[25] to be left with the definite and confirm conviction that a

Page 22

[1] mistake has been committed.

[2] Additionally, Mr. Meyerson has failed to establish
[3] that Judge Francis failed to apply relevant case law or
[4] statutes, that that is the standard of review that this Court
[5] should be governed by making its determination on this motion.

[6] And just to get into the merits, the reason that
[7] Ms. Hershey-Wilson's psychological history is relevant and
[8] discoverable, is because she put it at issue by claiming and
[9] seeking emotional distress damages.

[10] We are governed by the complaint which suggests that
[11] there are residual effects that she suffered as a result of her
[12] arrest, which was a sworn statement as well as interrogatory
[13] responses, indicate that in interrogatory 5 she suffered
[14] emotional distress, mental anguish, fear, psychological trauma.

[15] Because of that, it is clear -- and she is seeking
[16] damages, money damages, which would ultimately come from the
[17] taxpayers of New York for those damages which the city must be
[18] allowed an opportunity to examine intervening causation of her
[19] emotional distress, and obtain a picture of her psychological
[20] history.

[21] And one of the things that is also relevant, I would
[22] like to point out, is that the records we are seeking are
[23] contemporaneously relevant to her arrest. She was 24 at the
[24] time. The records reach back maybe four or five years. And
[25] under Judge Pitman's ruling in *McKenna*, he allowed in

Page 23

[1] psychological history that reached back five years, which is
[2] the same time frame that we are working with here.

[3] **MR. MIRRO:** Judge, if I may, just to add one or two
[4] brief points.

[5] **THE COURT:** Yes.

[6] **MR. MIRRO:** First, I want to thank you, Judge, for
[7] your patience today.

[8] A couple of points I wanted to mention, Judge. First,
[9] you asked earlier about the standard of review and Judge
[10] Francis's order.

[11] I would like to emphasize, Judge, Judge Francis had
[12] before him all of the factual materials and all of the factual
[13] arguments that we are making today.

[14] In addition, Judge Francis had before him the legal
[15] authorities that we submitted to your Honor. So Judge
[16] Francis's decision and Judge Francis's order, were based on
[17] both the facts and on the law.

[18] And in that situation, I would submit to you, Judge,
[19] that the standard here is, as Mr. Dougherty has said, is the
[20] clearly reasonable standard.

[21] This is not a case where the Judge Francis has made up
[22] purely a determination based on purely legal principles that
[23] might be a de novo, might be subject to de novo review by this
[24] Court. This decision was based on both facts and the law. And
[25] citation.

Page 24

[1] Maybe there is language in that order that suggests,
[2] loose language in the order, that suggests otherwise. But
[3] that's what was in front of him. And we would submit that
[4] Judge Francis couldn't have made a determination that your
[5] Honor's decision in *MacNamara* was pervasive unless he
[6] considered the factual underpinnings.

[7] The only other point, Judge, that I wanted to make at
[8] this point, the question of relevance has come up.

[9] Your Honor clearly understands what the issue is here.
[10] And the issue is, and as Mr. Dougherty said, the issue is one
[11] of causation.

[12] Mr. Meyerson's client is suing us for money due to
[13] emotional, claimed emotional distress, that results in waiver.
[14] And the reason that the emotional history, the psychological
[15] history are relevant, because we are entitled, as the Court has
[16] alluded to several times today, to examine this plaintiff on
[17] what alternative causes of emotional distress she may have been
[18] suffering at the time of her arrest and after her arrest.

[19] Your Honor, the principle here is that defendants are
[20] not obligated to take plaintiff's word for it, that her
[21] emotional distress was caused solely by the arrest and
[22] confinement.

[23] We understand that counsel -- plaintiff's counsel made
[24] a very fine argument, and we understand that he is advocating
[25] on behalf of his client. But we are not obligated, and it is

[1] contrary to the discovery rules to suggest that we are
[2] obligated, to take plaintiff's word for it on the causation
[3] question with respect to her emotional distress. And it goes
[4] to damages as well.

[5] I think that is the sum and substance of it, Judge.
[6] And, obviously, there is just a wealth of authority supporting
[7] both the MacNamara decision and the ruling that we are seeking
[8] here.

[9] I mean, and let's look at it, just one other point,
[10] one other point. Mr. Meyerson has not put in, really, any
[11] legal authority of substance. He got a wealth of authority
[12] from outside the district that obviously doesn't bind the
[13] Court. But he hasn't explained why this case is any different
[14] from all the decisions that do bind this Court, including
[15] Second Circuit opinions.

[16] And I think I will leave it at that.

[17] **THE COURT:** Sure. Mr. Meyerson, you get the last
[18] word.

[19] **MR. MEYERSON:** One, Mr. Dougherty talked about
[20] intervening causation. This is a preexisting causation, and I
[21] would agree with him, that if we were dealing with an
[22] intervening causation, that is that there had been the arrest,
[23] she said this, and then afterwards some other incident
[24] occurred, then it becomes -- and she sought treatment for that,
[25] we then have that intervening causation.

[1] **THE COURT::** I don't know that Rule 72 applies here,
[2] but I know, for it doesn't make sense to send it back to Judge
[3] Francis because then the losers are going to come back to me
[4] anyway. So whether or not it is de novo review or discretion,
[5] I would assume it is de novo review. Not that I think Judge
[6] Francis did anything wrong.

[7] Rule 26 provision for liberal discovery, anything that
[8] is relevant to, conservatively relevant to the case that can
[9] lead to admissible evidence, the parties are entitled to Rule
[10] 26. And the law recognizes privileges.

[11] But the law also disfavors privilege because they
[12] destruct the ascertainment of the truth. And, therefore, the
[13] law recognizes that in certain situations, when a plaintiff
[14] makes certain claims related to medical damages or mental
[15] health damages, then the plaintiff can be deemed to have waived
[16] the applicable privileges.

[17] Now, let me say, just so it is crystal clear for the
[18] record, I don't feel bound by what I ruled in MacNamara,
[19] because these are evidentiary rulings. These are discovery
[20] rulings. These are not matters of first impression where the
[21] principle is unaffected by the facts of the particular case.

[22] So it is true that the city put forth legal arguments
[23] in addition to my ruling in MacNamara. And whether Judge
[24] Francis felt he was bound by that ruling or he was persuaded by
[25] it, is of no import to this case. MacNamara is MacNamara, this

[1] Number 2, with all due respect to the city, in
[2] substance, they are ruled -- that Judge Francis was ruled by
[3] MacNamara, whether or not you were limiting it to -- he was
[4] precluding it to where he could go or not go on this matter.

[5] Finally, to the extent that the city wants to put into
[6] play the fact that she had a preexisting condition for which
[7] she sought treatment, they have the facts. I did not direct
[8] her not to answer, or -- she hasn't been deposed yet, but they
[9] know that she has, and she would answer, she had -- I guess it
[10] came out of her 58-H hearing. She did say, I had treatment, it
[11] was for depression, in family counseling.

[12] To the extent that they want to bring to the jury that
[13] there were other matters that implicated her actions, and the
[14] information in the records isn't going to elucidate anything.

[15] Thank you, your Honor. I apologize and I appreciate
[16] your indulgence.

[17] **MR. DOUGHERTY:** On the issue of causation, actually,
[18] one of the cases cited by Mr. Meyerson, Bridge v. Eastman
[19] Kodak, there was language in that case, on page 223, saying
[20] that, moreover, since plaintiff seeks to prove they suffered
[21] emotional distress, defense counsel has the right to inquire
[22] into plaintiff's past for showing, at least in part, that they
[23] were not job related.

[24] That case dealt with Title VII sexual harassment.
[25] But it should be considered in this case as well.

[1] case is this case.

[2] Now, in terms of this case, we have a 24-year-old
[3] plaintiff who has claimed, both in her complaint and in her
[4] interrogatory responses, which presumably she can't blame Mr.
[5] Meyerson for, that she suffered emotional distress,
[6] psychological trauma, fear, humiliation, embarrassment and
[7] anxiety.

[8] She went to see a doctor. And in the complaint she
[9] alleges that she continues to suffer residual emotional
[10] damages.

[11] Now, Mr. Meyerson may want to selectively withdraw
[12] that one sentence from the complaint. But her interrogatory
[13] answers are it. That is it. That is what she is claiming.

[14] And she would then ask a jury to award her damages,
[15] presumably not an insignificant amount of damages, based on
[16] those injuries.

[17] Now, some might call those garden variety. Some have
[18] described precisely those kind of damages being more than
[19] garden variety.

[20] I haven't read a case that gives the precise
[21] definition of what garden variety is.

[22] It has been my experience that garden variety is part
[23] in the eye of the beholder, but even assuming it is a garden
[24] variety claim, I am persuaded by the cases, not just in this
[25] district, but around the country, that have found that

April 20, 2006

Page 29

{1} precisely such claims waive the privilege to some extent.
 {2} Because I do think, to the extent that somebody is claiming,
 {3} for example, psychological trauma, even if she doesn't intend
 {4} to substantiate the claim, or to quantify her damages through
 {5} the use of an expert, just based on her own testimony of what
 {6} she felt, what she felt she was harmed by, what emotional pain
 {7} and suffering she claims to have been inflicted upon her, opens
 {8} the door to the possibility that the defendant should be
 {9} allowed to explore either alternate causes for such
 {10} psychological trauma and other mental health damages, and also
 {11} to rebut the claim for the amount of damages that the plaintiff
 {12} might seek from a jury.

{13} And the cases that discuss this, discuss it in a wide
 {14} variety of contexts, employment discrimination, and civil
 {15} rights, and specifically describe them as garden variety cases,
 {16} and specifically note that the plaintiff is not claiming to
 {17} rely on an expert to substantiate the claim for mental health
 {18} damages.

{19} But the fact that plaintiff isn't saying,
 {20} notwithstanding what is in her complaint, that she continues to
 {21} suffer from these things, that may just go to the amount of
 {22} damages she gets, it doesn't change the fact that she is
 {23} alleging that the wrong done to her allegedly by the
 {24} defendants, caused her mental health harms.

{25} And it cannot be redressed as emotional distress, and

Page 30

{1} somehow pretend it is in in another category where there is no
 {2} relevance between somebody's mental health history and the
 {3} emotional distress that somebody claims to have suffered.

{4} And that is what the cases talk about. I am not going
 {5} to list them all. Some of the ones are the ones listed in the
 {6} city's papers. But I have read cases, there is a recent case
 {7} from the Eastern District of Michigan that goes through the law
 {8} on this.

{9} For the record, of course, I reviewed the McKenna
 {10} case. I reviewed the Sidor case, which Judge Buchwald does
 {11} say, even if it is garden variety, that it does open the door.

{12} There is a case called Williams versus NPC
 {13} International from the Northern District of Mississippi. There
 {14} is a case called Victoria versus Larkinder from the Eastern
 {15} District of Louisiana, Synbios. S-Y-N-B-I-O-S. Another
 {16} Colorado case called Fox versus The Gates Corporation.
 {17} District of Connecticut case called Gattegno, G-A-T-T-E-G-N-O,
 {18} versus Price Waterhouse Coopers LLP.

{19} And, by the way, so everybody's clear, none of this
 {20} means that if the defendant wants to do a Rule 35 examination,
 {21} that this ruling is a per se basis for them to get that. We
 {22} will have that fight if and when the defendant makes that
 {23} application.

{24} Now, I do think that, as Judge Pitman recognized, and
 {25} I think he is right, that this doesn't mean that the privilege

Page 31

{1} is waived in its entirety. It depends on the case. It depends
 {2} on the claim, it depends on the extent of the mental health
 {3} history that, in part, may depend on, for example, the length
 {4} of time between when somebody may have sought psychiatric
 {5} health or suffered from some sought of emotional disease. Even
 {6} and when the alleged injury took place.

{7} Here, even a five-year limitation, so the defendant
 {8} would not be allowed to go back further than five years into
 {9} plaintiff's mental health history, wouldn't change anything
 {10} because, as I understand it, a lot of the data is within the
 {11} five years. But I am not saying that five-year rule makes
 {12} sense here. I am saying that a 24-year old isn't getting any
 {13} comfort.

{14} I think what happened to her in high school and
 {15} college is relevant to what she is claiming in this case.

{16} And, Mr. Meyerson, I don't take lightly at all your
 {17} philosophical point. I understand this may put people like
 {18} your client in a potential dilemma, but that is what the law
 {19} does to your client's position. It is not just your client, it
 {20} is people alleging all kinds of mental health allegations. It
 {21} involves things in people's medical history that they don't
 {22} want revealed. But the law says they have to make a choice.
 {23} If they want to recover money for these types of injuries, then
 {24} they have to be prepared under these circumstances to
 {25} recognize, to properly allow the defendants to rebut the claim,

Page 32

{1} either in terms of causation or in damages, that they are going
 {2} to get peeked into that person's mental history, as in this
 {3} case.

{4} So I am affirming Judge Francis's ruling, even on the
 {5} de novo standard.

{6} **MR. MEYERSON:** Could I have the records before they
 {7} are sent to the city reviewed by Magistrate Judge Francis?

{8} **THE COURT:** Yes, thank you for reminding me of that.
 {9} It is something I did in MacNamara.

{10} If it is something, even in the context of
 {11} psychological records that would appear to be super sensitive,
 {12} for example, if there is something that comes up in an
 {13} evaluation by a doctor, that came up in a conversation with a
 {14} doctor, but really isn't relevant to the damages claimed here,
 {15} I don't want to give an example because I wouldn't want to
 {16} impugn your client, I wouldn't see a problem if you want to
 {17} have Judge Francis review them in camera first.

{18} I do think you should be judicious in using that tool.

{19} **MR. MEYERSON:** Do I understand -- my understanding is
 {20} that my client went to high school and lived in Portland. So I
 {21} don't even -- I get to her name of her family counselor,
 {22} psychiatrist, co-therapist, whoever it was. I will get an
 {23} authorization from my client and I will send for the records
 {24} and ask them to be delivered to Magistrate Judge Francis, I
 {25} guess.

[1] **THE COURT:** But that is precisely what I was
[2] suggesting I don't think you should do. Because what you are
[3] saying is that -- all of these records are so sensitive they
[4] should be reviewed in camera.

[5] **MR. MEYERSON:** I don't know. I don't even think --

[6] **THE COURT:** -- I know that you can take an appeal if
[7] you want.

[8] **MR. MEYERSON:** Well, then, I will get the records
[9] under your order, I will review them understanding your order
[10] is that I shouldn't just be knee jerk about it and make a
[11] judgment as to whether I think there is something in there that
[12] is of super sensitivity. For example, the topic of an
[13] incestuous thing, I am not suggesting that that is in there.

[14] **THE COURT:** What if, in the course of talking to a
[15] psychiatrist, somebody admits to committing a crime, a
[16] misdemeanor, that may have no relevance to this case
[17] whatsoever, could be highly prejudicial. It is a case that has
[18] been through a deferred prosecution or some sort of alternative
[19] resolution and wiped from the records. That might not go to
[20] her credibility. But I can see an argument being made. And
[21] what my ruling allows for is for you to exercise your judgment
[22] and seek refuge from Judge Francis.

[23] **MR. MEYERSON:** Secondly, and this is again an inquiry,
[24] assuming that my client decides that she doesn't want to pursue
[25] whatsoever emotional damage claims, and that the only claim she

[1] is an issue that, of course, came up in the MacNamara case.
[2] And we have that transcript. And there you described the type
[3] of records of being extraordinarily sensitive. I think the
[4] parties would benefit, Judge, from some clarification on what
[5] you mean.

[6] Here is my concern, Judge. We have a motion pending
[7] right now before Judge Francis, where one of the plaintiff's
[8] counsel is asking for Judge Francis to do a line-by-line review
[9] of psychological records, and to adopt certain redactions and
[10] so on. So the issue is going to be, the issue is very ripe
[11] before Judge Francis, I think it would be helpful if you could
[12] give some guidelines as to what you think --

[13] **THE COURT:** I think I just did by way of example. I
[14] can't do any better than what I have done.

[15] Again, you have to, from my standpoint, these have to
[16] be culled down the middle. The ruling that Mr. Meyerson got in
[17] his favor as to your client's work history, and the privileges
[18] and whatnot, if you had wanted to go to Judge Francis with
[19] something super or extremely sensitive, then you can make that
[20] application.

[21] But it is more a, you-will-know-it-when-you-see-it
[22] kind of thing. I can't give more direction. And, frankly, I
[23] would be more reluctant to because my involvement in discovery
[24] in this case is very different than Judge Francis's. He is in
[25] the weeds.

[1] will make is for the loss of her liberty and the violation of
[2] her rights, the damage claim, and I withdraw that claim
[3] formally and in every which way. I take it then the records
[4] become irrelevant?

[5] **THE COURT:** You are asking for an advisory opinion?

[6] **MR. MEYERSON:** No, I am asking, because there are
[7] three options, and the third option is to withdraw the lawsuit.

[8] I don't know what my client's answer is going to be.
[9] I never asked my client. But I wanted to make the arguments
[10] without me being affected that my client may elect to withdraw
[11] the case, because I think that it is punitive. I understand
[12] your ruling and you are not punitive.

[13] **THE COURT:** I -- you can do the research. If all she
[14] is going to claim is mere loss of liberty, you know, I haven't
[15] seen any cases that say one thing or another on it. But you
[16] can decide what you want to do. I hope she doesn't withdraw
[17] the whole case.

[18] **MR. MEYERSON:** I understand that. You are not going
[19] to rule on that. But on the issue --

[20] **THE COURT:** I couldn't possibly. I haven't thought
[21] about it, it's an advisory opinion, I understand why you asked
[22] for it. But I can't answer the question, Mr. Meyerson.

[23] **MR. MEYERSON:** Okay.

[24] **MR. MIRRO:** You raised an issue about in-camera review
[25] by Judge Francis of certain super sensitive records. And that

[1] So for me to tell him, an excellent jurist, to use Mr.
[2] Meyerson's laudatory phrasing, somebody who is steeped in the
[3] facts of these cases, to tell him how to evaluate these things,
[4] would be folly.

[5] Look, I am going to assume, with good reason, the good
[6] faith of Mr. Meyerson. And, of course, going to assume that
[7] Judge Francis will give this an expedited and serious and
[8] thorough review. And to the extent people have a disagreement
[9] with how he's handled it, I am here six days a week

[10] **MR. MIRRO:** One other question. We have had
[11] opportunity to review the MacNamara transcript where you talk
[12] about the in-camera procedure. One of the things you said, I
[13] just want to know if you are still on board with this, that the
[14] in-camera procedure should only be employed where something is
[15] super or extraordinarily sensitive, and where, you said,
[16] irrelevant to the case.

[17] **THE COURT:** But that is the balancing. From Mr.
[18] Meyerson's standpoint, the example I gave about, in the course
[19] of meeting with a therapist, something got said that has
[20] nothing to do with the therapy, just comes up with the
[21] conversation. I am taking an extreme example. It arguably
[22] will not be -- it is not discoverable, or even if it is
[23] remotely relevant, and maybe there is some other reason to
[24] preclude it being turned over, what if, in the context of
[25] talking about her psychological past, she brings up a medical

April 20, 2006

Page 37

[1] issue that has got nothing to do with this case, deeply
[2] personal medical issue, that has got nothing to do with this
[3] case, then Judge Francis could decide that the records will get
[4] turned over in redacted form. I can't give any more direction
[5] than that.

[6] **MR. MIRRO:** My only concern is that if a patient is
[7] going to a psychotherapist or counselor or psychologist to deal
[8] with her emotional distress, presumably serious emotional
[9] distress, arising from something, whatever that something is,
[10] then my question becomes, gee, is that still an issue in this
[11] plaintiff's life, was it an issue at the time of her arrest.

[12] **THE COURT:** When you get something that is redacted
[13] and you want to challenge it, you call me up and I will see
[14] you.

[15] **MR. MEYERSON:** I take it that any records that are
[16] eventually turned over to the city will be turned over under
[17] protection?

[18] **THE COURT:** Yes. Thank you, Mr. Meyerson.

[19] **MR. MEYERSON:** And finally, I am not sure what I am
[20] going to do, and with all due respect to you, because I raised
[21] it in my submission, I am asking you to certify the issue, it
[22] is a very -- I am professionally and personally concerned about
[23] this issue. After 36 years, there are not too many issues that
[24] pound me, because you have seen it all. But this is kind of an
[25] issue that I think is a very, very important issue.

Page 38

[1] **THE COURT:** You don't even have the records handy
[2] right now, so you are going -- it is going to take you some
[3] time to get the records, go over them with your client, and you
[4] can decide what you want to do. And you can let me know.

[5] **MR. MEYERSON:** Thank you, your Honor.

[6] **THE COURT:** I don't think there is any prejudice to
[7] defendants if, since Mr. Meyerson isn't sitting on the records
[8] anyway, I would, even if he were, I would give him some time to
[9] think it over.

[10] I have been told many times by the city that you are
[11] overworked anyway, so you can work on other motions that are
[12] coming your way.

[13] **MR. DOUGHERTY:** Your Honor, just one, finally. I just
[14] want to be clear that Mr. Meyerson turns over the records to
[15] Judge Francis, and he is not involved in any self-review or
[16] redaction prior to these being closed to the case. Plaintiff
[17] should not be involved in selective determination of relevance
[18] of their psychological records.

[19] **THE COURT:** I think what Mr. Meyerson and I talked
[20] about is that he will turn them over, except to the extent
[21] there is something he would like Judge Francis to review and
[22] perhaps redact. So what you are talking about is Mr. Meyerson
[23] shows the documents to nobody, you or Judge Francis, that is
[24] not at all what we talked about.

[25] **MR. DOUGHERTY:** I guess I just wanted some

[1] clarification.

[2] **THE COURT:** He is going to turn over his client's
[3] mental history records. But he is going to look at them in
[4] their entirety and decide whether or not there are some things,
[5] some documents, some records within that bundle that he would
[6] like Judge Francis to say he doesn't have to turn over. And
[7] the rest of it he will turn over. He will turn it over if
[8] Judge Francis disagrees with him. So everything gets turned
[9] over unless Judge Francis says it doesn't.

[10] **MR. DOUGHERTY:** Thank you, your Honor.

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April 20, 200

1	admonition 6:18 adopt 35:9	around 5:19,19;15:18; 28:25	C	25:33;25:34;2,2,14 claimed 24:13;28:3;32:14
18-year-old 20:9	advisory 34:5,21 advocating 24:24	arrest 19:24;22:12,23; 24:18,18,21;25:22;37:11	call 7:25;28:17;37:13 called 30:12,14,16,17	claiming 9:5;22:8;28:13; 29:2,16;31:15
2	affected 34:10 affirming 32:4	arrested 7:10,16;13:7 art 12:22	came 5:12;26:10;32:13; 35:1	claims 3:1;7:6;12:22; 13:12;27:14;29:1,7;30:3; 33:25
2 26:1 20 14:1 2007 3:9 21 5:14	afraid 18:25 afterwards 25:23	ascertainment 27:12 associated 19:23	camera 32:17;33:4 can 4:8;6:15;7:23;9:15; 12:5,22,24;16:20;18:6,6; 27:8,15;33:6,20;34:13,16; 35:19;38:4,4,11	clarification 35:4;39:1 clear 22:15;27:17;30:19; 38:14
21-year-old 5:15 223 26:19 24 7:9,9,18;14:10,14,22; 18:7;20:10,14;22:23	Again 14:17;35:15 against 15:6	assume 17:5;27:5;36:5,6 assuming 28:23;33:24 Assuming 8:14	assumption 19:11 attack 12:24	clearly 3:3;4:6;21:21,23; 23:20;24:9
24 7:9,9,18;14:10,14,22; 18:7;20:10,14;22:23 24-year 20:9;31:12 24-year-old 16:4;28:2 25 7:20;8:15,17,18;12:4 26 27:7,10	ago 4:10;11:13;13:11 agree 10:13;25:21 agreed 5:22	attempting 11:10 attended 14:10	Can 13:16 careful 3:10;9:13 carefully 17:19 Carter 10:23	client 5:14;7:8,9;8:11,14; 10:4;11:6;12:3;14:12;16:4; 5,23;17:2;19:18;20:3; 24:12,25;31:18,19;32:16, 20,23;33:24;34:9,10;38:3
3	ahead 7:2;16:9 air 7:21	attitude 5:21 attorney 16:20	case 3:18,20,22;4:4,13, 15,17,19;5:2,6;6:13;8:6,6; 10:10;11:4;12:19;18:9,17, 17;19:8,17;20:1,17;21:19; 22:3;23:21;25:13;26:19,24, 25;27:8,21,25;28:1,1,2,20; 30:6,10,10,12,14,16,17; 31:1,15;32:3;33:16,17; 34:11,17;35:1,24;36:16; 37:1,3;38:16	client's 5:21;6:4;31:19; 34:8;35:17;39:2 clinical 8:2 closed 38:16
35 30:20 36 37:23	albeit 3:20 allegations 31:20 alleged 9:18;31:6 allegedly 29:23	authority 25:6,11,11 authorization 32:23 award 8:17;28:14	B	collar 3:11 college 31:15 Colorado 30:16 comfort 31:13
5	alleges 28:9 alleging 29:23;31:20 allow 31:25	back 7:22;19:10;21:14; 22:24;23:1;27:2,3;31:8 balancing 36:17 based 23:16,22,24;28:15; 29:5	cases 4:15;6:11;17:12,15; 18:15,20;21:4;26:18;28:24; 29:13,15;30:4,6,34;15;36:3	coming 6:5;38:12 comment 17:18 commit 13:21
5 22:13 58-H 26:10	allowed 22:18,25;29:9; 31:8 allows 33:21 alluded 24:16	basically 7:17 basis 6:8;11:11;30:21 become 34:4 becomes 25:24;37:10 behalf 24:25	category 30:1 causation 12:25;15:24; 22:18;24:11;25:2,20,20,22, 25;26:17;32:1	committed 22:1 committing 33:15 common 15:18
6	almost 4:14;12:16,16; 14:11 alternate 29:9 alternative 24:17;33:18	benefit 35:4 better 9:8;35:14 beyond 13:9 bind 25:12,14 bit 9:14	caused 24:21;29:24 causes 24:17;29:9 cavalier 5:21 ceased 13:10 certain 12:13;27:13,14; 34:25;35:9	comparison 19:16 complaint 12:5;14:25; 15:5;16:11,17,18,24,25; 22:10;28:3,8,12;29:20
65 9:11	although 17:19 Although 5:25 amended 16:24	blame 28:4 blanket 20:18 board 36:13 bootstrapping 12:16 both 6:7;23:17,24;25:7; 28:3	category 30:1 causation 12:25;15:24; 22:18;24:11;25:2,20,20,22, 25;26:17;32:1	complex 10:1 concedes 18:2 conceivable 13:8;15:21 concern 35:6;37:6
7	amount 12:14;28:15; 29:11,21 anguish 22:14 antithetical 15:17	bother 28:23 benefit 35:4 better 9:8;35:14 beyond 13:9 bind 25:12,14 bit 9:14	cause 8:9 caused 24:21;29:24 causes 24:17;29:9 cavalier 5:21 ceased 13:10 certain 12:13;27:13,14; 34:25;35:9	concerned 37:22 conclude 10:5 condition 7:19,25;8:2,2; 21:9,10;26:6
71 8:3 72 3:24;4:5;21:18;27:1 74 19:2;20:13 74-year-old 16:4	antiwar 19:17 anxiety 8:19;13:13;15:7; 28:7 anxious 7:20	brought 15:6 Buchwald 10:5;30:10 Buchwald's 9:24 buck 6:12 building 3:10 bunch 12:19 bundle 39:5	certify 37:21 challenge 37:13 change 29:22;31:9 choice 31:22 circles 13:15 circuit 7:4 Circuit 3:6;6:20,21;17:12; 25:15	confer 3:8 confined 14:22 confinement 24:22 confirm 21:25 conglomerate 5:5
A	apologize 5:9,11;17:19; 26:15 appeal 6:16;33:6 appeals 3:23 appear 32:11 applicable 27:16 application 30:23;35:20	brief 23:4 briefly 21:23 bring 26:12 bringing 11:18 brings 14:17;36:25 broad 7:6;20:22,22,24; 21:1,2	Citco 21:24 cite 3:9 cited 12:20;26:18 citing 3:5;4:17 city 3:5;10:24;11:20; 19:18,25;22:17;26:1,5; 27:22;32:7;37:16;38:10 City 14:13 city's 30:6 civil 18:17;29:14 claim 8:9;9:16;10:1; 12:12;13:1;16:21,22;17:2, 3;28:24;29:4,11,17;31:2,	consequence 3:8 confer 3:8 confined 14:22 confinement 24:22 confirm 21:25 conglomerate 5:5 Connecticut 30:17 connection 10:3 conservatively 27:8 considered 5:4;24:6; 26:25
able 18:11 abuse 3:24 accept 6:17;8:5 accepted 19:4 access 9:15;10:6,19; 15:25	arching 16:11 arguably 3:1;36:21 argue 10:15;11:2 arguing 21:11 argument 17:17;19:4; 24:24;33:20 arguments 4:11;6:9; 10:13;19:11,12;23:13; 27:22;34:9 arising 37:9	brought 15:6 Buchwald 10:5;30:10 Buchwald's 9:24 buck 6:12 building 3:10 bunch 12:19 bundle 39:5	circumstances 31:24 citation 23:25 Citco 21:24 cite 3:9 cited 12:20;26:18 citing 3:5;4:17 city 3:5;10:24;11:20; 19:18,25;22:17;26:1,5; 27:22;32:7;37:16;38:10 City 14:13 city's 30:6 civil 18:17;29:14 claim 8:9;9:16;10:1; 12:12;13:1;16:21,22;17:2, 3;28:24;29:4,11,17;31:2,	conversation 32:13; 36:21
according 18:20 action 4:22 actions 15:6;26:13 activist 5:16 actually 13:23;14:15,16; 21:1;26:17	apologize 5:9,11;17:19; 26:15 appeal 6:16;33:6 appeals 3:23 appear 32:11 applicable 27:16 application 30:23;35:20	brought 15:6 Buchwald 10:5;30:10 Buchwald's 9:24 buck 6:12 building 3:10 bunch 12:19 bundle 39:5	circumstances 31:24 citation 23:25 Citco 21:24 cite 3:9 cited 12:20;26:18 citing 3:5;4:17 city 3:5;10:24;11:20; 19:18,25;22:17;26:1,5; 27:22;32:7;37:16;38:10 City 14:13 city's 30:6 civil 18:17;29:14 claim 8:9;9:16;10:1; 12:12;13:1;16:21,22;17:2, 3;28:24;29:4,11,17;31:2,	contemporaneously 22:23 context 32:10;36:24 contexts 29:14 continues 28:9;29:20 contrary 3:3,24;4:6; 21:21;25:1
Actually 5:12;9:22 add 23:3 addition 12:20;23:14; 27:23 Additionally 22:2 admissible 27:9 admits 33:15 admitted 11:14,15	apologize 5:9,11;17:19; 26:15 appeal 6:16;33:6 appeals 3:23 appear 32:11 applicable 27:16 application 30:23;35:20	brought 15:6 Buchwald 10:5;30:10 Buchwald's 9:24 buck 6:12 building 3:10 bunch 12:19 bundle 39:5	circumstances 31:24 citation 23:25 Citco 21:24 cite 3:9 cited 12:20;26:18 citing 3:5;4:17 city 3:5;10:24;11:20; 19:18,25;22:17;26:1,5; 27:22;32:7;37:16;38:10 City 14:13 city's 30:6 civil 18:17;29:14 claim 8:9;9:16;10:1; 12:12;13:1;16:21,22;17:2, 3;28:24;29:4,11,17;31:2,	consequence 3:8 confer 3:8 confined 14:22 confinement 24:22 confirm 21:25 conglomerate 5:5 Connecticut 30:17 connection 10:3 conservatively 27:8 considered 5:4;24:6; 26:25

April 20, 2006

conviction 21:25 Coopers 30:18 Corporation 30:16 co-therapist 32:22 counsel 4:12;24:23,23; 26:21;35:8 counseling 7:12;11:16; 19:20;26:11 counselling 7:13 counselor 32:21;37:7 country 9:23;15:18;28:25 couple 23:8 course 16:20;30:9;33:14; 35:1;36:6,18 court 21:15 Court 3:7;21:24;22:4; 23:24;24:15;25:13,14 COURT 3:8,13;4:9,23;5:1, 7,11,17;6:25;7:2;8:3,8;9:4, 20;10:9,15;11:21;12:7,9, 11,18;13:12,17;14:4,25; 15:3,5,13,17;16:13;17:6; 18:13,20;19:1;20:16,23; 21:1,6,12;23:5;25:17;27:1; 32:8;33:1,6,14;34:5,13,20; 35:13;36:17;37:12,18;38:1, 6,19;39:2 courts 9:21,23,23;12:20; 15:18;19:3 Courts 20:20 cracked 9:14 credibility 33:20 cried 20:4 crime 33:15 critical 6:17,18 crying 19:21 crystal 27:17 culled 35:16 custody 8:17;19:18;20:4	deciding 9:9 decision 3:6;5:6;6:19; 9:25;19:7,12;20:2;23:16, 24;24:5;25:7 decisions 16:3;25:14 deemed 27:15 deeply 37:1 defend 15:23 defendant 5:20;29:8; 30:20;22:31;7 defendants 9:15;12:11, 24;15:6,23;24:19;29:24; 31:25;38:7 defendant's 18:15 defense 12:12;26:21 defer 19:10 deferred 4:16;33:18 defined 16:18 definite 21:25 definitely 3:14 definition 28:21 degree 10:7 delivered 32:24 demerit 3:5 demonstration 19:17 denies 8:4 depend 31:3 depends 20:17;31:1,1,2 deposed 26:8 deposition 14:13 depressed 7:13;13:7; 18:24 depression 11:16;13:14; 18:2;26:11 describe 29:15 described 8:4;28:18;35:2 describing 21:9 destruct 27:12 determination 22:5; 23:22;24:4;38:17 determine 4:2 determined 4:3 developing 8:6 different 4:19;9:12;11:21; 21:10;25:13;35:24 differential 6:8 dilemma 31:18 direct 26:7 direction 35:22;37:4 directly 19:16 disagreement 36:8 disagrees 39:8 discoverable 22:8;36:22 discovery 3:19;20:4;7; 11:22;25:1;27:7,19;35:23 discretion 3:24;27:4 discrimination 18:17; 29:14 discuss 29:13,13 discussion 18:13 disease 31:5 disfavors 27:11 disprove 11:9	distinction 18:15 distress 13:1,13;15:7; 22:9,14,19;24:13,17,21; 25:3;26:21;28:5;29:25; 30:3;37:8,9 district 9:21,24;10:18,22; 11:1;18:11;25:12;28:25 District 4:21;10:23;30:7, 13,15,17 doc 13:8 doctor 28:8;32:13,14 doctrine 17:11 documents 38:23;39:5 done 29:23;35:14 door 9:14;29:8;30:11 Dougherty 3:13;23:19; 24:10;25:19 DOUGHERTY 4:1,20,25; 5:3;21:13;26:17;38:13,25; 39:10 down 19:15;35:16 Dr 7:22,23 drafted 16:18 drafting 16:24 due 6:17;7:3;20:21;24:12; 26:1;37:20 during 19:21	establish 22:2 evaluate 17:7;36:3 evaluation 32:13 evaporated 7:21 even 9:7,14;11:6,10; 12:21;18:9;19:12;28:23; 29:3;30:11;31:7;32:4,10, 21;33:5;36:22;38:1,8 Even 9:5;31:5 event 10:21;12:25;17:1 events 10:2 eventually 37:16 everybody's 30:19 everyone 12:23 evidence 8:20;27:9 evidentiary 27:19 examination 10:25;11:9; 18:23;30:20 examine 22:18;24:16 example 13:16,17;29:3; 31:3;32:12,15;33:12;35:13; 36:18,21 excellent 36:1 except 11:5;38:20 exercise 33:21 exist 13:10 expect 13:4 expedited 36:7 experience 14:16;28:22 expert 13:23;29:5,17 explained 18:6;25:13 explore 29:9 extent 5:20;9:17;12:20; 15:24;16:17,22,23;19:22; 26:5,12;29:1,2;31:2;36:8; 38:20 extraordinarily 35:3; 36:15 extreme 36:21 extremely 35:19 eye 28:23	fight 30:22 figured 10:1 file 6:16 filed 15:6 finally 37:19;38:13 Finally 26:5 find 13:4 fine 13:11;24:24 first 16:17;21:6,13;27:20; 32:17 First 23:6,8 fish 11:5 five 11:13;13:7;22:24; 23:1;31:8,11 five-point 3:5 five-year 16:6;31:7,11 flow 17:23 flows 17:1 focused 19:7 folly 36:4 forget 10:9;12:4 form 37:4 formally 34:3 forth 27:22 fortunate 20:8 found 28:25 four 7:16;13:10;22:24 Fox 30:16 frame 23:2 Francis 3:16,22;4:2,14; 5:4,22;6:7;10:12;19:10,11; 22:3;23:11,14,21;24:4; 26:2;27:3,6,24;32:7,17,24; 33:22;34:25;35:7,8,11,18; 36:7;37:3;38:15,21,23; 39:6,8,9 Francis's 3:3;21:21; 23:10,16,16;32:4;35:24 frankly 35:22 fresh 7:21 freshman 19:19;20:9 front 7:4;11:18;24:3 further 31:8
D		E		F
damage 7:6;13:13;33:25; 34:2 damages 9:17;13:1; 14:20;15:7,9,24;20:3;22:9, 16,16,17;25:4;27:14,15; 28:10,14,15,18;29:4,10,11, 18,22;32:1,14 data 31:10 daughter 5:15;14:17 day 7:4;9:7;13:25;15:11, 22;17:4;19:22;20:5 days 36:9 de 10:16;23:23,23;27:4,5; 32:5 deal 37:7 dealing 25:21 dealt 26:24 debate 14:7,8;16:12,15 decide 13:20;34:16;37:3; 38:4;39:4 decides 33:24		earlier 4:6;23:9 easily 17:14 Eastern 30:7,14 Eastman 26:18 effect 3:17;4:17,24;5:2 effects 22:11 eight 19:18,21 either 8:18;9:16;18:17; 21:21;29:9;32:1 elect 34:10 elucidate 26:14 embarrassment 28:6 emotional 7:6,17,18; 8:12,16,21;9:5;10:20; 13:13;14:9;15:7,9,10,21; 17:1,8;19:23;20:3;21:8; 22:9,14,19;24:13,13,14,17, 21;25:3;26:21;28:5,9;29:6, 25;30:3;31:5;33:25;37:8,8 emphasize 23:11 employed 36:14 employment 18:17;29:14 encompassing 16:25 end 8:25;9:7 ended 3:2;9:1 endorsement 4:9 enlightening 14:15 enough 6:15;20:10 entirety 31:1;39:4 entitled 14:5,6;24:15;27:9 equating 14:9 erroneous 3:3;4:6;21:21, 23	fact 8:7,8;9:6;12:3;13:9; 18:1,23;20:4;26:6;29:19,22 facts 5:5;7:8;8:7,7;19:5; 23:17,24;26:7;27:21;36:3 factual 23:12,12;24:6 failed 16:23;21:20;22:2,3 failure 8:5 Fair 6:15 faith 36:6 false 19:23 family 7:11,12;11:16; 20:5,11;26:11;32:21 far 12:22 fascinating 14:8 favor 35:17 fear 22:14;28:6 feel 27:18 feels 3:22 felt 4:9;8:19;27:24;29:6,6	G garden 12:22;28:17,19, 21,22,23;29:15;30:11 garden-variety 11:3 Gates 30:16 Gattegno 30:17 G-A-T-T-E-G-N-O 30:17 gave 36:18 gee 13:6;37:10 gets 3:5,18;7:16;16:2; 29:22;39:8 giddiness 18:9 gives 28:20 goes 5:19;13:20;25:3; 30:7 good 14:15;36:5,5 governed 4:6;21:15,17; 22:5,10

April 20, 200

governing 21:20 graduates 7:15 great 7:2 guess 26:9;32:25;38:25 guidelines 35:12	incarcerated 17:3 incestuous 33:13 incident 8:4;25:23 including 25:14 inconsequential 16:16 independent 7:12 indicate 22:13 indicated 6:13;14:20 indicted 17:1 indignation 5:13 indulgence 26:16 inflicted 29:7 information 3:2;15:25; 26:14 injuries 9:5;17:28;16; 31:23 injury 8:12;16;22;9:18; 14:3;19:16;23;31:6 inner 18:22 inquire 26:21 inquiring 17:21 inquiry 17:23;33:23 insignificant 28:15 intend 29:3 interest 18:16 interesting 17:14 International 30:13 interpret 10:19 interrogatory 22:12,13; 28:4,12 interrupting 15:13;17:19 intervening 22:18;25:20, 22:25 into 7:24;11:5;12:4,16,16, 21;17:16;22:6;26:5,22; 31:8;32:2 intrinsic 14:11;18:7 inure 17:14 involuntarily 13:21; 14:23 involved 38:15,17 involvement 35:23 involves 31:21 irrelevant 15:20;34:4; 36:16 irrespective 17:25 issue 3:19;4:11;5:25;6:3; 12:2;22:8;24:9,10,10; 26:17;34:19,24;35:1,10,10; 37:1,2,10,11,21,23,25,25 issues 37:23	19:10,11;20:12;21:21;22:3, 25;23:3,6,8,9,11,11,14,15, 16,18,21;24:4,7;25:5;26:2; 27:2,5,23;30:10,24;32:4,7, 17,24;33:22;34:25;35:4,6, 7,8,11,18,24;36:7;37:3; 38:15,21,23;39:6,8,9 judgment 33:11,21 Judicial 3:8 judicious 32:18 jurist 6:22,23;7:2;36:1 jury 8:17;11:18,18;17:7; 18:6,6;26:12;28:14;29:12	limiting 15:4;26:3 limits 15:14;16:1 Lindenal 21:24 line-by-line 35:8 list 30:5 listed 30:5 listened 17:18 litigation 7:24;11:17;20:2 little 9:14 lived 32:20 LLP 30:18 logic 10:25 look 6:8;11:1,7,7;12:6; 20:3;25:9;39:3 Look 36:5 loose 24:2 losers 27:3 loss 8:18;14:10;19:24; 34:1,14 lot 14:17;31:10 Louisiana 30:15 lucky 7:4	meniscus 13:23,24 mental 6:4;7:19,25;9:11; 12:25;13:4,18;15:10,19,22; 18:12,16;19:25;21:10; 22:14;27:14;29:10,17,24; 30:2;31:2,9,20;32:2;39:3 mention 23:8 mentioned 16:10 mere 34:14 merely 10:20 merits 10:12;22:6 Meyerson 3:14,17,23; 5:8;10:13;15:5,13;16:13; 18:5;21:12,20;22:2;25:10, 17;26:18;28:5,11;31:16; 34:22;35:16;36:6;37:18; 38:7,14,19,22 MEYERSON 5:9,12,24; 7:1,3;8:5,10;9:19,22;10:11, 17;11:23;12:8,10,15;13:3, 16;14:3,5;15:2,4,12,16; 16:10,15;17:17;18:19,22; 19:9;20:20,24;21:4,8; 25:19;32:6,19;33:5,8,23; 34:6,18,23;37:15,19;38:5 Meyerson's 6:9;24:12; 36:2,18 Michigan 30:7 middle 13:21;35:16 might 3:10;6:9;10:13; 12:12;13:6,14;14:23;18:8, 8;19:3;23:23,23;28:17; 29:12;33:19 MIRRO 3:7,12;23:3,6; 34:24;36:10;37:6 misconduct 3:1 misdemeanor 33:16 Mississippi 30:13 mistake 22:1 moment 12:5 money 8:18;12:7,9,13; 13:24;22:16;24:12;31:23 more 9:25;19:16;28:18; 35:21,22,23;37:4 moreover 16:11;26:20 most 11:5;14:22 motion 4:5,8;22:5;35:6 motions 38:11 must 11:24;22:17 myself 14:20
H handled 36:9 handy 38:1 happen 13:8 happened 20:5;31:14 happens 5:15 harassment 26:24 harm 15:22 harmed 29:6 harms 15:9;17:11;29:24 health 6:4;7:19,25;9:11; 13:4,18,19;18:12,16;19:25; 21:10;27:15;29:10,17,24; 30:2;31:2,5,9,20 hear 3:14;12:18;17:20 hearing 26:10 helpful 15:14;35:11 herein 8:4 Hershey-Wilson 5:14 Hershey-Wilson's 22:7 high 7:11,15;9:11;11:13; 13:5,6;16:5;18:24;19:2,2; 20:11;31:14;32:20 highly 11:5;33:17 himself 6:8 history 9:10,11,16;13:14; 15:10;18:16;22:7,20;23:1; 24:14,15;30:2;31:3,9,21; 32:2;35:17;39:3 home 9:3 Honor 3:12;4:1,5,9,25; 6:16;8:19;17:17;18:3,10; 20:21;21:13;23:15;24:9,19; 26:15;38:5,13;39:10 Honor's 24:5 hope 34:16 hospital 13:20 hot 3:11 hours 7:18,20;8:15,17,18; 12:4;14:10,14,23;18:4,7; 19:18,21 humiliation 28:6 hundred 3:21 hurt 13:25	K Karas 6:11,12,15 Kara's 4:11 Karas's 10:14;20:12 kept 5:15 kid 13:5,6;20:8 kind 9:7;28:18;35:22; 37:24 kinds 17:15;31:20 knee 13:22;14:3;19:16; 33:10 Kodak 26:19 Koeltl 6:21,25	L language 24:1,2;26:19 largely 7:21;9:1 Larkinder 30:14 last 19:15;21:7;25:17 later 7:20 laudatory 36:2 law 3:4,25;4:4,7,14;5:5; 6:6,13;7:7;10:18,22;11:1; 12:2;16:14;17:10;18:11; 20:15;21:11,15,19,22;22:3; 23:17,24;27:10,11,13;30:7; 31:18,22 lawsuit 16:21;34:7 lead 27:9 leading 10:5 leads 17:23 least 5:22;18:19;26:22 leave 25:16 left 21:25 leg 13:25 legal 6:1,7;16:15;17:17; 23:14,22;25:11;27:22 length 31:3 level 4:7 liberal 27:7 liberty 8:18;14:10;18:7; 19:24;34:1,14 life 9:8;37:11 lightly 31:16 likely 5:3 limitation 16:6,7;31:7 limited 15:1	M MacNamara 3:16;4:5; 5:1,6;6:6,19,24;7:6,9;14; 19:7;20:24;21:3;24:5;25:7; 26:3;27:18,23,25,25;32:9; 35:1;36:11 magistrate 9:25;11:7 Magistrate 3:19;4:21;5:4; 6:7;10:5,11;19:10,11;32:7, 24 Maine 7:23 majority 9:20,22 makes 27:14;30:22;31:11 making 13:2;22:5;23:13 man 14:12 manner 16:24 many 15:18;19:3;37:23; 38:10 material 10:7;11:5 materials 23:12 matter 6:14;21:2,11;26:4 matters 26:13;27:20 may 7:12;23:3;24:17; 28:11;29:21;31:3,4,17; 33:16;34:10 maybe 18:1;20:10,15; 22:24;36:23 Maybe 24:1 McKenna 22:25;30:9 mean 7:7;14:12;25:9; 30:25;35:5 means 30:20 medial 13:24 medical 27:14;31:21; 36:25;37:2 medication 7:14,15; 11:15;13:10 meeting 36:19 memo 4:9	N name 32:21 narrow 5:25;6:3;12:2; 16:21 narrowed 17:2 narrowest 12:2 natural 7:17;17:4,6,22,23; 18:8 necessarily 4:23 need 18:3;21:14 needs 18:5
I implicated 26:13 implications 6:2 implied 10:12 import 17:18;20:2;27:25 important 37:25 impression 27:20 impugn 32:16 in-camera 34:24;36:12, 14	J jail 7:18;8:15;9:1;12:4,6; 14:10,14;18:8 jerk 33:10 job 26:23 judge 4:21 Judge 3:2,15,19,21;4:2, 10,14,21;5:22;6:7,11,12, 14,21,25;9:24;10:11,14,23, 23,24;11:24;12:15;16:6;			

April 20, 2006

<p>neither 20:1 New 14:13;17:10;12:22:17 next 19:22;20:5 nobody 38:23 nonclinical 8:2 nonconsolidated 4:22 none 30:19 nonsensical 12:17 nor 20:1 Northern 30:13 note 29:16 not-pleasant 14:23 notwithstanding 29:20 novo 10:16;23:23,23; 27:4,5;32:5 NPC 30:12 Number 26:1 NYU 19:19;20:20:9</p>	<p>over 16:2;36:24;37:4,16, 16;38:3,9,14,20:39:2,6,7,7, 9 overrule 6:15,15 overruling 6:14 overturned 4:8 overworked 38:11 own 4:18;29:5</p>	<p>point 5:22;7:5;8:6;11:24; 14:22;19:3,15,16;21:23; 22:22;24:7,8;25:9,10;31:17 points 23:4,8 Portland 32:20 position 6:13;11:8;12:17; 20:21;21:5;31:19 possibility 29:8 possibly 34:20 potential 31:18 potentially 15:8;17:8 pound 37:24 practical 6:1,8 pre 6:4 precise 28:20 precisely 28:18;29:1;33:1 preclude 36:24 precluded 3:16;6:14; 19:13 precludes 4:11 precluding 26:4 preclusive 4:23;5:2 preexisting 25:20;26:6 prejudice 38:6 prejudicial 33:17 prelitigation 10:2,4 prelitigation-incident 6:5 prepare 12:12 prepared 31:24 presumably 28:4,15;37:8 pretend 15:19;30:1 pretty 3:11 previous 6:13 Price 30:18 principle 24:19;27:21 principles 23:22 prior 4:11;10:8,9;13:14; 14:1;38:16 privilege 5:21,23;6:4; 12:1,21;27:11;29:1,30:25 privileged 3:1;11:25 privileges 27:10,16; 35:17 probably 5:5;9:2;14:5,6 problem 10:11;32:16 procedure 21:16;36:12, 14 professionally 37:22 profound 6:1,1 prominently 10:2 proper 4:20 properly 31:25 prosecution 33:18 protection 37:17 prove 11:10;26:20 provision 27:7 psychiatric 11:13;31:4 psychiatrist 8:1;11:1,9; 18:3,5;32:22;33:15 psychiatrists 10:1 psychological 9:10,16; 17:11;22:7,14,19;23:1;</p>	<p>24:14;28:6;29:3,10;32:11; 35:9;36:25;38:18 psychologist 37:7 psychotherapist 37:7 pull 4:10;21:14 punitive 34:11,12 purely 23:22,22 purposes 3:19 put 7:24;9:9;12:4,5;13:18, 22:15;9,14;18:5;21:9;22:8; 25:10;26:5;27:22;31:17</p>	<p>refer 4:18 referred 3:19 Refining 21:24 refuse 33:22 reject 21:4 relate 13:14 related 3:20;4:22;18:22; 20:5;26:23;27:14 relevance 10:7;13:9; 15:21;16:8;24:8;30:2; 33:16;38:17 relevant 10:6;12:24;13:9, 11;20:17,18;22:3,7,21,23; 24:15;27:8,8;31:15;32:14; 36:23 reluctant 35:23 rely 29:17 reminding 32:8 remotely 36:23 removed 19:1 reopen 21:3 reply 4:21 research 34:13 residual 9:5;22:11;28:9 resolution 33:19 respect 6:17;20:21,21; 25:3;26:1;37:20 response 10:17 responses 22:13;28:4 rest 39:7 restrained 18:7 result 9:7,18;22:11 results 24:13 revealed 31:22 reversed 7:1 review 3:15;10:15;22:4; 23:9,23;27:4,5;32:17;33:9; 34:24;35:8;36:8,11;38:21 reviewed 30:9,10;32:7; 33:4 reviewing 21:24 right 4:24;5:19;9:3,4;12:7; 18:14;19:7;26:21;30:25; 35:7;38:2 righteous 5:13 righteousness 5:10,11 rights 18:17;29:15;34:2 ripe 35:10 ripped 13:23 RNC 7:10,16 rule 18:18;20:18;21:17; 31:11;34:19 Rule 3:24;4:5;21:18;27:1, 7,9;30:20 ruled 3:7;6:10;20:23;26:2, 2:27:18 rules 21:15;25:1 ruling 3:16,20,22,23;4:4, 11,17,18;5:1,3;6:12;9:13; 10:8,9,14;20:12,22,22,25; 21:1,2,21;22:25;25:7; 27:23,24;30:21;32:4;33:21; 34:12;35:16</p>
<p>O</p>	<p>P</p>	<p>Q</p>	<p>Quaker 14:12,15,16,18,19 quantify 29:4 Quick 3:13 quote 8:3</p>	<p>R</p>
<p>o0o 39:13 objection 8:19 obligated 24:20,25;25:2 obtain 22:19 obviously 10:3;25:6,12 occurred 25:24 off 19:21;20:5 offended 11:19 offending 12:25 offense 6:25 old 5:14;7:9;19:2;20:9; 31:12 older 14:12 Once 9:14 one 3:20;12:23;16:11; 22:21;23:3;24:10;25:9,10; 26:18;28:12;34:15;35:7; 38:13 One 16:11;25:19;36:10,12 ones 12:20;30:5,5 only 5:18,21;19:1;24:7; 33:25;36:14;37:6 open 9:14;20:7;30:11 opens 29:7 opinion 6:10;34:5,21 opinions 3:9;25:15 opportunity 22:18;36:11 option 34:7 options 34:7 order 23:10,16;24:1,2; 33:9,9 ordinarily 11:25 ordinary 17:4,6,7 Ores 7:22 Orres 7:23 orthopedic 14:1 otherwise 24:2 ouch 13:22 out 4:10,10:5;12:7;20:9,1, 24;11,12,18;13:18,22;14:1; 22:22;26:10 outside 25:12</p>	<p>page 26:19 pain 13:25;29:6 paper 14:16,19 papers 4:2;30:6 Paragraph 8:3 part 5:4,14;19:4;26:22; 28:22;31:3 particular 27:21 parties 27:9;35:4 party 16:20 past 15:19;17:9;18:16; 26:22;36:25 patience 23:7 patient 37:6 peeked 32:2 pending 35:6 people 3:10;14:22;31:17, 20;36:8 people's 31:21 per 30:21 perhaps 38:22 Perhaps 13:6 older 14:12 permanent 8:1 permissible 10:20 person 13:21 personal 37:2 personally 37:22 person's 15:19;32:2 persuaded 27:24;28:24 persue 33:24 pervasive 24:5 philosophical 16:12; 31:17 Philosophical 16:15 philosophy 16:13;17:16 phrasing 36:2 physical 13:18 picture 22:19 Pitman 16:6;30:24 Pitman's 22:25 place 31:6 plaintiff 8:3;17:15;18:16; 24:16;26:20;27:13,15;28:3; 29:11,16,19 Plaintiff 38:16 plaintiff's 4:12;24:20,23; 25:2;26:22;31:9;35:7; 37:11 play 21:9;26:6 please 20:21 plenty 17:12</p>	<p>R</p> <p>raised 4:12;34:24;37:20 Rather 9:25 rationale 4:3 reach 22:24 reached 23:1 reaction 7:17,18;8:16,22; 10:21;14:9,14;17:4;18:1,2, 8;21:8 read 12:19,19;18:20; 19:12;28:20;30:6 reading 10:14 reality 7:7 realize 6:21;21:14 really 11:2;25:10;32:14 reason 12:24;16:6;22:6; 24:14;36:5,23 reasonable 16:8;23:20 rebut 9:16;12:12;29:11; 31:25 recent 30:6 recently 6:20 recognize 17:13;18:15; 31:25 recognized 6:22;17:11; 30:24 recognizes 16:7;17:10; 27:10,13 record 6:4;7:24;8:20; 16:2;18:24;27:18;30:9 records 6:4;7:23;9:2; 10:6,19;11:5,11,24,25; 13:4;14:6;16:5,9;17:24,24, 25;19:3,25;20:14;22:22,24; 26:14;32:6,11,23;33:3,8, 19:34;3,25;35:3,9;37:3,15; 38:1,3,7,14,18;39:3,5 recover 31:23 redact 38:22 redacted 37:4,12 redaction 38:16 redactions 35:9 redressed 29:25</p>	<p>R</p> <p>raised 4:12;34:24;37:20 Rather 9:25 rationale 4:3 reach 22:24 reached 23:1 reaction 7:17,18;8:16,22; 10:21;14:9,14;17:4;18:1,2, 8;21:8 read 12:19,19;18:20; 19:12;28:20;30:6 reading 10:14 reality 7:7 realize 6:21;21:14 really 11:2;25:10;32:14 reason 12:24;16:6;22:6; 24:14;36:5,23 reasonable 16:8;23:20 rebut 9:16;12:12;29:11; 31:25 recent 30:6 recently 6:20 recognize 17:13;18:15; 31:25 recognized 6:22;17:11; 30:24 recognizes 16:7;17:10; 27:10,13 record 6:4;7:24;8:20; 16:2;18:24;27:18;30:9 records 6:4;7:23;9:2; 10:6,19;11:5,11,24,25; 13:4;14:6;16:5,9;17:24,24, 25;19:3,25;20:14;22:22,24; 26:14;32:6,11,23;33:3,8, 19:34;3,25;35:3,9;37:3,15; 38:1,3,7,14,18;39:3,5 recover 31:23 redact 38:22 redacted 37:4,12 redaction 38:16 redactions 35:9 redressed 29:25</p>	<p>R</p> <p>raised 4:12;34:24;37:20 Rather 9:25 rationale 4:3 reach 22:24 reached 23:1 reaction 7:17,18;8:16,22; 10:21;14:9,14;17:4;18:1,2, 8;21:8 read 12:19,19;18:20; 19:12;28:20;30:6 reading 10:14 reality 7:7 realize 6:21;21:14 really 11:2;25:10;32:14 reason 12:24;16:6;22:6; 24:14;36:5,23 reasonable 16:8;23:20 rebut 9:16;12:12;29:11; 31:25 recent 30:6 recently 6:20 recognize 17:13;18:15; 31:25 recognized 6:22;17:11; 30:24 recognizes 16:7;17:10; 27:10,13 record 6:4;7:24;8:20; 16:2;18:24;27:18;30:9 records 6:4;7:23;9:2; 10:6,19;11:5,11,24,25; 13:4;14:6;16:5,9;17:24,24, 25;19:3,25;20:14;22:22,24; 26:14;32:6,11,23;33:3,8, 19:34;3,25;35:3,9;37:3,15; 38:1,3,7,14,18;39:3,5 recover 31:23 redact 38:22 redacted 37:4,12 redaction 38:16 redactions 35:9 redressed 29:25</p>

April 20, 200

rulings 3:3:27:19,20 S	somebody 9:2;13:12; 15:22;29:2;30:3;31:4; 33:15;36:2 Somebody 13:20 somebody's 30:2 somehow 30:1 someone's 15:10 sorry 15:16 sort 4:13;13:13;33:18 Sotomayor 10:23 sought 8:7,8;25:24;26:7; 31:4,5 Southern 4:21 specifically 29:15,16 stand 8:11,14;17:1 standard 3:15;4:6,7; 10:15;21:18,19,20;22:4; 23:9,19,20;32:5 standards 15:20 standing 8:10 standpoint 35:15;36:18 State 17:12 statement 22:12 statutes 22:4 steeped 36:2 still 36:13;37:10 stop 9:4 strikes 15:17 struck 3:4 struggling 13:22 student 19:19 subject 23:23 subjected 11:9 submission 14:8;37:21 submit 4:1,4;23:18;24:3 submitted 23:15 subsequently 21:15 substance 25:5,11;26:2 substantiate 29:4,17 suffer 8:12;28:9;29:21 suffered 13:13;15:11,22; 22:11,13;26:20;28:5;30:3; 31:5 suffering 13:25;24:18; 29:7 suggest 10:19,22;25:1 suggesting 33:2,13 suggests 22:10;24:1,2 suing 24:12 sum 8:18;25:5 super 32:11;33:12;34:25; 35:19;36:15 supporting 25:6 Supreme 3:7 sure 37:19 Sure 25:17 surgeon 14:2 surprised 12:18 sworn 22:12 Synbios 30:15 S-Y-N-B-I-O-S 30:15	T table 18:14 tailor 19:5 talk 10:9;30:4;36:11 talked 25:19;38:19,24 talking 33:14;36:25;38:22 taxpayers 22:17 temporal 16:3 term 12:22 terms 28:2;32:1 testify 12:4,6 testimony 13:23;29:5 therapist 7:13;9:6,8,12; 36:19 therapy 6:5;7:16;10:4; 13:10;36:20 thereafter 17:4 therefore 6:14;11:8;27:12 thin 17:10 thinking 5:15 third 34:7 thorough 36:8 though 7:22 thought 34:20 three 34:7 throughout 9:23,24 times 24:16;38:10 Title 26:24 today 23:7,13;24:16 told 38:10 took 7:20;31:6 tool 32:18 topic 33:12 totally 7:22 touch 10:13 toward 5:21 transcript 35:2;36:11 transcripts 4:4 trauma 17:1;22:14;28:6; 29:3,10 treatment 8:7,8;11:13; 25:24;26:7,10 trial 8:11;9:9 tried 14:8 triggers 6:3;10:21;12:1,3; 20:6 true 27:22 truth 27:12 trying 15:3,8,9;19:6 turn 38:20;39:2,6,7,7 turned 16:2;36:24;37:4, 16,16;39:8 turns 14:1;38:14 tweaking 5:18 two 16:10;17:4;23:3 type 35:2 types 31:23 U ultimately 4:3;22:16	unaffected 27:21 under 3:11;20:12;21:18; 19,19;22:25;31:24;33:9; 37:16 Under 21:24 underpinnings 24:6 understandable 19:14 understands 24:9 unfortunate 20:10,12 unhappy 8:23 unless 17:8;24:5;39:9 unpublished 3:6,9 up 3:2;8:10;13:2;14:17; 20:13;23:21;24:8;32:12,13; 35:1;36:20,25;37:13 upon 29:7 upset 12:6;14:24;19:22; 20:6 use 15:21;29:5;36:1 used 5:5 using 12:23;32:18 V value 11:4,17,23;18:24 variety 12:22;28:17,19, 21,22,24;29:14,15;30:11 versus 21:24;30:12,14, 16,18 Victoria 30:14 view 7:6;9:20,22,23 views 10:1 VII 26:24 violation 34:1 visits 9:11 W waive 19:12;29:1 waived 12:21;27:15;31:1 waiver 6:3;10:21;12:1; 20:7;24:13 wall 15:9 wants 26:5;30:20 Waterhouse 30:18 way 9:20;18:10;30:19; 34:3;35:13;38:12 wealth 25:6,11 weeds 35:25 week 36:9 whatnot 35:18 what's 11:6 whatsoever 33:17,25 whole 34:17 wide 29:13 Williams 30:12 wiped 33:19 wisdom 6:22,22 withdraw 8:13;16:21,21; 17:2;28:11;34:2,7,10,16 within 16:7;17:12;31:10; 39:5 without 15:24;34:10	witness 8:11,14 word 24:20;25:2,18 worded 14:25 work 35:17;38:11 working 23:2 worth 5:17 write 6:10 wrong 6:23;27:6;29:23 wrote 14:16,19 Y years 5:14;7:9,16;11:13; 13:7,11;14:1;19:1,2;22:24; 23:1;31:8,11;37:23 yells 13:22 York 14:13;17:10,12; 22:17 young 20:8 you-will-know-it-when-you- see-it 35:21
---------------------------	---	---	---	--